U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

Date: JAN 29 2013 Office: NEBRASKA SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a steel construction company. It seeks to employ the beneficiary permanently in the United States as a civil engineer. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the marriage fraud bar under section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c) applies to the case and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 27, 2010 decision, the primary issue in this case is whether or not the marriage bar under section 204(c) of the Act applies to this case. This petition was denied as a result of the beneficiary's other immigrant visa petition. A Form I-130, Petition for Alien Relative, was filed on the beneficiary's behalf on October 15, 2001. Concurrent with the filing of the Form I-130, the beneficiary also sought lawful permanent residence and employment authorization as the immediate relative of a U.S. citizen. The file contains the completed forms, signed by the beneficiary and a copy of a marriage certificate between the beneficiary and [redacted] the Form I-130 petitioner.

In connection with the Form I-130, a decision was issued by the district director of the U.S. Citizenship and Immigration Services (USCIS) office located in Santa Ana, California on June 19, 2007. The director denied the Form I-130 because the beneficiary's marriage certificate was "determined to be fraudulent."

Section 204(c) of the Act provides for the following:

> Notwithstanding the provisions of subsection (b)[1] no petition shall be approved if:
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> (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws; or
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> (2) the [director] has determined that the alien has attempted or conspired to enter

[1] Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

into a marriage for the purpose of evading the immigration laws.

The record contains no evidence of the bona fides of the marriage.[2]

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. An alien is inadmissible to the United States where he or she "by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." *See* section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(c).[3]

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik* 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board held that visa revocation pursuant to section 204(c) may only be

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[2] Where there is reason to doubt the validity of the marital relationship, the petitioner must present evidence to show that the marriage was not entered into for the purpose of evading the immigration laws. Such evidence could take many forms, including, but not limited to, proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts, and testimony or other evidence regarding courtship, wedding ceremony, shared residence, and experiences. *See Matter of Soriano*, I&N Dec. 764 (BIA 1988). The petitioner has not submitted sufficient evidence to show that the marriage was not entered into for the purpose of evading the immigration laws in the instant case.

[3] In *Matter of Estime*, the BIA made two conclusions: (a) "[a] determination of statutory ineligibility is not valid unless based on evidence contained in the record of proceedings" (*Matter of Estime*, 19 I&N Dec. 450, 451-452 (BIA 1987)); and (b) the review on appeal is limited to the record of proceedings before the director. *Id. See also* 8 C.F.R. § 103.8(d):

> The term *record of proceeding* is the official history of any hearing, examination, or proceeding before [USCIS], and in addition to the application, petition or other initiating document, includes the transcript of hearing or interview, exhibits, and any other evidence relied upon in the adjudication; papers filed in connection with the proceedings, including motions and briefs; the [USCIS] officer's determination; notice of appeal or certification; the Board or other appellate determination; motions to reconsider or reopen; and documents submitted in support of appeals, certifications, or motions.

USCIS administrative procedure requires the creation of a permanent A-file to house the appellate record of any denied *immigrant* visa petition. USCIS Adj. Field Manual 22.2(l)(2) ("If the grounds of denial have not been overcome, an A-file is created to house the record of proceeding and the case must be forwarded to the AAO in accordance with 8 CFR 103.3."). If an A-file already exists for that alien, the denied petition is consolidated into the existing A-file. The system is designed to consolidate the denials common to an alien into his or her permanent A-file so that they can be reviewed with subsequent visa petitions to prevent petitioners for permanent resident status from concealing an element of ineligibility or materially changing their claims.

sustained if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading the immigration laws. *See also Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972). It is noted, however, that the instant appeal does not involve a revocation of an approval of a Form I-140 petition.

In the instant case, an independent review of the documentation in the record of proceeding finds that there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the beneficiary's prior marriage was entered into for the purpose of evading immigration laws.

The record establishes that:

- The marriage certificate from Los Angeles County, California, registration number [redacted] a U.S. citizen was determined to be fraudulent because the recorder has no record of this marriage certificate. The beneficiary's signature on the marriage certificate matches his signature on several documents in the record, including the signed statement submitted in response to USCIS' Notice of Intent to Deny.

- The beneficiary's photograph attached to the Form G-325A, submitted with the Form I-130, matches the photo on his driver's license and Employment Authorization Card.

On appeal, counsel states that the "beneficiary was a victim of a scam and had no active participation in the supposed marriage of he and a [redacted]' Counsel submitted an affidavit from the beneficiary to support this assertion. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his claims. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). In addition, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).[4]

Therefore, an independent review of the documentation in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the prior marriage was

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[4] A petitioner's marriage was a sham if the bride and groom did not intend to establish a life together at the time they were married. *See Bark v. Immigration and Naturalization Service*, 511 F.2d 1200 (1975). Conduct of the parties *after marriage* is relevant only to the extent that it bears upon their subjective state of mind *at the time they were married. See Lutwak v. United States*, 344 U.S. 604 (1953).

entered into for the purpose of evading the immigration laws. There is also substantial and probative evidence that the beneficiary participated in this attempt to defraud the U.S. government by signing and submitting false documentation. Thus, the director's determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by USCIS to have been entered into for the purpose of evading the immigration laws is affirmed.

Beyond the decision of the director, the petitioner has also failed to establish that the ETA Form 9089 supports a professional holding an advanced degree.

In pertinent part, section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834.

The instant Form I-140 was filed on September 8, 2008. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability. The required education, training, experience, and special requirements for the offered position are set forth at Part H of the ETA Form 9089. Here, Part H shows that the position requires a bachelor's degree, or foreign educational equivalent, in civil engineering, structural engineering, or related field and 36 months of experience in the job offered. This experience requirement would allow a beneficiary to qualify with less than a bachelor's degree and 5 years of experience.

Since the minimum requirements, as stated on the ETA Form 9089, do not require the beneficiary to have either a master's degree or a bachelor's degree and 5 years of experience, the petitioner has not

established that the ETA Form 9089 requires a professional holding an advanced degree; and the appeal must also be dismissed for this reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.